

In the **Supreme Court of the United States**

DAVID RITTER,

Petitioner,

v.

LINDA MIGLIORI, FRANCIS J. FOX, RICHARD E. RICHARDS,
KENNETH RINGER, SERGIO RIVAS, ZAC COHEN, AND
LEHIGH COUNTY BOARD OF ELECTIONS,

Respondents.

**On Petition for a Writ of Certiorari to the United
States Court of Appeals for the Third Circuit**

**MOTION FOR LEAVE TO FILE BRIEF AS AMICI
CURIAE AND BRIEF FOR SPEAKER OF THE
PENNSYLVANIA HOUSE OF REPRESENTATIVES,
BRYAN CUTLER, MAJORITY LEADER OF THE
PENNSYLVANIA HOUSE OF REPRESENTATIVES,
KERRY BENNINGHOFF, PRESIDENT PRO
TEMPORE OF THE PENNSYLVANIA SENATE,
JAKE CORMAN, AND MAJORITY LEADER OF THE
PENNSYLVANIA SENATE, KIM WARD AS AMICI
CURIAE IN SUPPORT OF PETITIONER**

ZACHARY M. WALLEN

Counsel of Record

CHALMERS & ADAMS LLC

301 South Hills Village Drive

Suite LL200-420

Pittsburgh, Pennsylvania 15241

Phone: 412-200-0842

Email: zwallen@chalmersadams.com

Counsel for Amici Curiae

MOTION FOR LEAVE TO FILE BRIEF AS
AMICI CURIAE

Pursuant to Supreme Court Rule 37.2(b), Speaker of the Pennsylvania House of Representatives, Bryan Cutler, Majority Leader of the Pennsylvania House of Representatives, Kerry Benninghoff, President Pro Tempore of the Pennsylvania Senate, Jake Corman, and Majority Leader of the Pennsylvania Senate, Kim Ward respectfully move for leave to file the accompanying brief as *Amici Curiae*.

The Legislative Leaders seek to bring this brief in this appeal as *Amici Curiae* in support of their authority as representatives of a legislative body under the U.S. Constitution, and respectfully move for leave of Court to file the accompanying *Amicus* brief in support of Petitioner.

This brief will be helpful and desirable as *Amici Curiae* assert that the Pennsylvania General Assembly, of which all *Amici* are members, has the authority as Pennsylvania's legislature to prescribe the "Times, Places, and Manner of holding elections" under Article I, § 4, cl. 1 of the U.S. Constitution. Moreover, the matters discussed in the brief are desirable and directly relevant to the disposition of the case, as *Amici* are in the unique position of being able to offer legislative history and background on the statutes in question, and to offer their legislative perspective on why the statutes in question are both constitutional and material. Thus, the proposed *Amicus* brief is desirable, as it was in the District Court and the Third Circuit Court of Appeals, each of which previously granted the Legislative Leaders the right to participate

in the proceedings below as *Amici*. Accordingly, *Amici Curiae* request that their motion to file the attached *Amicus* brief be granted.

No party opposes the filing of this *Amicus* brief. Petitioner, Respondent, Zac Cohen, and Respondents, Linda Migliori, Francis J. Fox, Richard E. Richards, Kenneth Ringer, and Sergio Rivas all consent to the filing of this brief. Respondent, Lehigh County Board of Elections, does not oppose the filing of this brief.

Amici therefore respectfully move this Court for leave to file an *Amici Curiae* brief in this matter.

Respectfully submitted on this 10th day of August, 2022.

CHALMERS & ADAMS LLC

ZACHARY M. WALLEN
Counsel of Record
301 South Hills Village Drive
Suite LL200-420
Pittsburgh, Pennsylvania 15241
Phone: 412-200-0842
Email: zwallen@chalmersadams.com

*Counsel for Amici Curiae Speaker of the
Pennsylvania House of Representatives, Bryan Cutler,
Majority Leader of the Pennsylvania House of
Representatives, Kerry Benninghoff,
President Pro Tempore of the Pennsylvania Senate,
Jake Corman, and Majority Leader of the
Pennsylvania Senate, Kim Ward*

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTERESTS OF *AMICI CURIAE*. 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. The Statutes in Question Were Properly Enacted Pursuant to the General Assembly’s Constitutional Authority to Legislate for the Procedures that Govern Pennsylvania’s Elections. 3

 A. *The Legislative History of the Statutes in Question Demonstrates a Clear Commitment by the General Assembly to Free, Equal, and Fair Elections.* 3

 B. *The Requirement to Date and Sign Absentee and Mail-In Ballots Serves a Clear Purpose as a Part of the General Assembly’s Comprehensive Election Code* 5

 C. *The Statutes Do Not Violate the Materiality Provision* 7

II. The Decision of the Court Below Improperly Truncated the Power of the General Assembly to Legislate for Pennsylvania’s Elections. 10

III. Should the Third Circuit’s Decision be Left in Place it Would be Unworkable 13

A. *The Third Circuit's Decision is Unworkable and Will Lead to a Torrent of Additional Litigation* 13

B. *The Third Circuit's Decision Voids Act 77 And the Very Institution of No-Excuse Mail-In Voting* 15

CONCLUSION 19

RETRIEVED FROM DEMOCRACYDOCKET.COM

TABLE OF AUTHORITIES**CASES**

<i>Applewhite v. Commonwealth</i> , 54 A.3d 1 (Pa. 2012)	14
<i>Barr v. Am. Ass'n of Political Consultants</i> , 140 S. Ct. 2335 (2020)	18
<i>Brnovich v. Democratic National Committee</i> , 141 S. Ct. 2321 (2021)	12
<i>Chapman v. Berks Cty. Bd. of Elections</i> , No. 355 MD 2022 (Pa. Commw. Ct.)	14
<i>Condon v. Reno</i> , 913 F. Supp. 946 (D.S.C. 1995)	8, 9
<i>Diaz v. Cobb</i> , 435 F. Supp. 2d 1206 (S.D. Fla. 2006)	9
<i>Donald J. Trump for President, Inc. v. Boockvar</i> , 493 F. Supp. 3d 331 (W.D. Pa. 2020)	7
<i>Dondiego v. Lehigh Cty. Bd. of Elections</i> , No. 5:22-cv-2111-JLS (E.D. Pa.)	14
<i>Friedman v. Snipes</i> , 345 F. Supp. 2d 1356 (S.D. Fla. 2004)	9, 10, 11
<i>In re 2,349 Ballots in the 2020 Gen. Election</i> , 241 A.3d 694 (Pa. Commw. Ct. 2020)	6
<i>In re Canvass of Nov. 3, 2020 Gen. Election</i> , 241 A.3d 1058 (Pa. 2020)	6
<i>League of Women Voters v. Commonwealth</i> , 178 A.3d 737 (Pa. 2018)	14

<i>McKay v. Altobello</i> , CIVIL ACTION NO. 96-3458, 1996 U.S. Dist. LEXIS 16651 (E.D. La. Oct. 31, 1996)	9
<i>McLinko v. Commonwealth</i> , No. 14 MAP 2022 (Pa. Aug. 2, 2022)	15
<i>McLinko v. Commonwealth</i> , 270 A.3d 1243 (Pa. Commw. Ct. 2022)	15, 16
<i>Migliori v. Cohen</i> , 36 F. 4th 153 (3d Cir. 2022)	10, 11, 12, 16
<i>Migliori v. Lehigh Cty. Bd. of Elections</i> , 2022 U.S. Dist. LEXIS 46352 (E.D. Pa. 2022)	6, 8
<i>Pa. Democratic Party v. Boockvar</i> , 238 A.3d 345 (Pa. 2020)	14, 15
<i>Republican Party of Pa. v. Degraffenreid</i> , 141 S. Ct. 732 (2021)	14
<i>Ritter v. Lehigh Cty. Bd. of Elections</i> , No. 1322 C.D. 2021, 2022 Pa. Commw. Unpub. LEXIS 1 (Pa. Commw. Ct. Jan. 3, 2022)	6, 10
<i>Ritter v. Migliori</i> , 142 S. Ct. 1824 (2022)	11, 12, 13
<i>Schwier v. Cox</i> , 340 F.3d 1284 (11th Cir. 2003)	8
<i>Schwier v. Cox</i> , 439 F.3d 1285 (11th Cir. 2006)	9
<i>Stilp v. Commonwealth</i> , 905 A.2d 918 (Pa. 2006)	16, 17, 18

<i>Turzai v. Brandt</i> , 139 S. Ct. 445 (2018)	14
<i>United States v. Munsingwear, Inc.</i> , 340 U.S. 36 (1950)	2, 15, 19
<i>Weber v. Shelley</i> , 347 F.3d 1101 (9th Cir. 2003)	7
CONSTITUTION	
Pa. Const. Art. VII	12
U.S. Const. Art. I	3
STATUTES AND LEGISLATION	
25 P.S. § 3031.12	5
25 P.S. § 3146.1	4
25 P.S. § 3146.6	4, 5
25 P.S. § 3146.6(a)	4, 10, 12
25 P.S. § 3150.16	10
25 P.S. § 3150.16(a)	5, 12
25 Pa. Cons. Stat. § 1301(a)	11
25 Pa. Cons. Stat. § 2811	11
52 U.S.C. § 10101(a)(2)	8
2019 Pa. Legis. Serv. Act 2019-77 (S.B. 421) (West)	16
Act No. 37, Session of 1963, Pub. L. No. 707, § 22	3, 4

INTERESTS OF *AMICI CURIAE*¹

Amici Curiae, Speaker of the Pennsylvania House of Representatives, Bryan Cutler, Majority Leader of the Pennsylvania House of Representatives, Kerry Benninghoff, President Pro Tempore of the Pennsylvania Senate, Jake Corman, and Majority Leader of the Pennsylvania Senate, Kim Ward (the “Legislative Leaders”), have a strong interest in the outcome of this case, and in the underlying issues being carefully considered by this Court.

The Legislative Leaders, as leaders of the two coequal houses of the Pennsylvania legislative branch, have been heavily involved in the implementation of election policy and procedures in the Commonwealth, pursuant to the powers granted to the General Assembly under the federal and state Constitutions.

The Legislative Leaders have personal and direct insight into both the goals of the General Assembly in its recent amendments to the Pennsylvania Election Code, including the statutes that are the subject of this litigation. The Legislative Leaders have been granted leave to file *Amicus* briefs in this case by both the District Court and the Third Circuit Court of Appeals.

¹ Petitioner, Respondent, Zac Cohen, and Respondents, Linda Migliori, Francis J. Fox, Richard E. Richards, Kenneth Ringer, and Sergio Rivas all consent to the filing of this brief. Respondent, Lehigh County Board of Elections, does not oppose the filing of this brief. All counsel received timely notice of the filing of this brief. No party’s counsel authored any part of this brief. No person other than *Amici* and their counsel contributed any money intended to fund the preparation or submission of this brief.

In addition, the Legislative Leaders filed an *Amicus* brief in the related state court litigation.

SUMMARY OF ARGUMENT

The Legislative Leaders strongly support Petitioner's request that the decision of the court below be vacated pursuant to this Court's decision in *United States v. Munsingwear*. While the Legislative Leaders would prefer that this Court grant *certiorari* and reverse the Third Circuit's decision on its merits, given the mootness concerns, the Legislative Leaders support Petitioner's request for the Third Circuit's decision to be vacated pursuant to *Munsingwear*.

The Third Circuit's decision has upended carefully constructed election administration procedures – procedures that were previously upheld by Pennsylvania state courts and the United States District Court. Should the decision be left in place, it is unclear how Pennsylvania will be able to conduct an orderly election in November – especially when by the letter of the decision of the court below, any regulation of vote by mail would be deemed “immaterial” should it not directly relate to voter eligibility.

The Third Circuit's decision invalidating those vote-by-mail procedures also triggers the non-severability clause of the legislation that created no-excuse mail-in voting in the first place, thereby calling into question whether no-excuse mail-in voting will be a part of Pennsylvania elections going forward.

The Legislative Leaders respectfully ask this Court to grant Petitioner's requested relief to restore needed

certainty as to how the upcoming General Election will be conducted.

ARGUMENT

I. **The Statutes in Question Were Properly Enacted Pursuant to the General Assembly's Constitutional Authority to Legislate for the Procedures that Govern Pennsylvania's Elections**

A. ***The Legislative History of the Statutes in Question Demonstrates a Clear Commitment by the General Assembly to Free, Equal, and Fair Elections***

In the present case, the statutes that have been the subject of this litigation are straightforward sections of the Election Code implemented by the General Assembly pursuant to its constitutional powers under the Elections Clause of Article I, § IV of the U.S. Constitution. Notwithstanding the decision of the court below, by the plain meaning of both the Election Code and the decisions of Pennsylvania courts, it is unequivocal that Pennsylvania law requires both a signature and date on a legally cast mail-in ballot. Moreover, the orderly procedures necessary for the free and equal administration of elections are of vital importance to the Commonwealth and cannot reasonably be deemed immaterial.

The requirement in question has a long history as a part of the Commonwealth's Election Code. While originally absentee voting was limited to military voters, absentee voting was extended to the general public in 1963. *See* Act No. 37, Session of 1963, Pub. L.

No. 707, § 22 (amending Section 1306 of the Election Code (25 P.S. § 3146.6) to apply beyond military voters). Even then, Pennsylvania law only allowed absentee voting by those with a statutorily defined excuse to do so, such as physical disability or absence from their municipality on Election Day. *See* 25 P.S. § 3146.1. For someone to vote absentee, the voter would have had to provide a permissible reason to do so, and the voter would have been provided with an absentee ballot that would have had to be returned by the voter no later than 5:00 p.m. on the Friday before the election. *Id.*

Since that 1963 enactment, the procedure for marking an absentee ballot has remained constant. A Pennsylvania absentee voter, after marking his or her ballot, shall:

then fold the ballot, enclose and securely seal the same in the envelope on which is printed, stamped or endorsed 'Official Election Ballot.' This envelope shall then be placed in the second one, on which is printed the form of declaration of the elector, and the address of the elector's county board of election and the local election district of the elector. **The elector shall then fill out, date and sign the declaration printed on such envelope.** Such envelope shall then be securely sealed and the elector shall send same by mail, postage prepaid, except where franked, or deliver it in person to said county board of election.

25 P.S. § 3146.6(a) (emphasis added); *see also* Act No. 37, Session of 1963, Pub. L. No. 707, § 22 (amending

Section 1306 of the Election Code (25 P.S. § 3146.6) to apply beyond military voters) (“The elector shall then fill out, date[,] and sign the declaration printed on such envelope.”).

In 2019, when the General Assembly expanded the ability to vote by mail by creating a new category of “no excuse” mail-in voting through Act 77², that identical procedure of filling out, dating, and signing the envelope was applied to mail-in voters. *See* 25 P.S. § 3150.16(a).

Moreover, the traditional voting options have always remained available – voters may still choose to request an absentee ballot if they have a statutorily permitted reason for doing so, or vote in-person on Election Day. *See* 25 P.S. § 3146.1; 25 P.S. § 3031.12.

B. The Requirement to Date and Sign Absentee and Mail-In Ballots Serves a Clear Purpose as a Part of the General Assembly’s Comprehensive Election Code

The requirement that electors date and sign their absentee or mail-in ballot return envelope serves a variety of important election administration purposes. “The date on the ballot envelope provides proof of when the ‘elector actually executed the ballot in full, ensuring their desire to cast it in lieu of appearing in person at a polling place. The presence of the date also

² Act 77 was a wide-ranging piece of legislation that included, *inter alia*, a non-severability clause should any of its provisions be deemed unenforceable. The applicability of the non-severability clause to the present case is discussed more particularly below.

establishes a point in time against which to measure the elector's eligibility to cast the ballot[.]' The date also ensures the elector completed the ballot within the proper time frame and prevents the tabulation of potentially fraudulent back-dated votes." *In re Canvass of Nov. 3, 2020 Gen. Election*, 241 A.3d 1058, 1079 (Pa. 2020) (Dougherty, J., concurring and dissenting) (quoting *In re 2,349 Ballots in the 2020 Gen. Election*, 241 A.3d 694 (Pa. Commw. Ct. 2020) (memorandum); *Ritter v. Lehigh Cty. Bd. of Elections*, No. 1322 C.D. 2021, 2022 Pa. Commw. Unpub. LEXIS 1, at *10-11 (Pa. Commw. Ct. Jan. 3, 2022) (same).

The District Court reached the same conclusion in its own analysis in this case, holding that these statutory provisions serve "an important public interest in the integrity of an election process that ensures fair, efficient, and fraud-free elections is served by compliance with the statute mandating the handwritten date requirement." *Migliori v. Lehigh Cty. Bd. of Elections*, 2022 U.S. Dist. LEXIS 46352, at *38-39 (E.D. Pa. 2022). As Judge Leeson further observed:

An elector's compliance with the signature and date requirement is an important guard against fraud. Where an elector fully complies with the instructions on the outer envelope, the electoral authorities conducting the election can be assured of the date on which the ballot was executed. Where, however, the outer envelope remains undated, the possibility for fraud is heightened, as individuals who come in contact with that outer envelope may, post hoc, fill in a

date that is not representative of the date on which the ballot was executed.

Id. at *38.

As the District Court for the Western District of Pennsylvania similarly concluded, “the Pennsylvania legislature ‘weigh[ed] the pros and cons,’ and adopted a broader system of ‘no excuse’ mail-in voting as part of the Commonwealth’s Election Code.” *Donald J. Trump for President, Inc. v. Boockvar*, 493 F. Supp. 3d 331, 395 (W.D. Pa. 2020) (citing *Weber v. Shelley*, 347 F.3d 1101, 1107 (9th Cir. 2003)). “And the key point is that the legislature made that judgment in the context of erecting a broader election scheme that authorizes other forms of voting and has many . . . safeguards in place to catch or deter fraud and other illegal voting practices.” *Id.* at 396. “In this larger context, the Court cannot say that the balance Pennsylvania struck across the Election Code was unreasonable, illegitimate, or otherwise not ‘sufficiently weighty to justify . . .’” *Id.*

Therefore, given the General Assembly’s constitutional power to prescribe the time, place, and manner of the Commonwealth’s elections, the clear legislative mandate of what is required of the elector, and the election-administration purposes of the statute, the statute in question is an important part of Pennsylvania’s Election Code.

C. *The Statutes Do Not Violate the Materiality Provision*

The Third Circuit incorrectly granted relief under the Materiality Provision of the Voting Rights Act, a civil rights statute dealing with discrimination

pertaining to voter registration that has no applicability to a non-discriminatory election administration statute.

While the Petitioner, Respondent Lehigh County Board of Elections, and the District Court found numerous important threshold problems with the voters' standing to bring this case, even considering the merits of the voters' claims, the Materiality Provision has no application to the matters at hand. *See Migliori v. Lehigh Cty. Bd. of Elections*, 2022 U.S. Dist. LEXIS 46352, at *24-35 (E.D. Pa. 2022)

Pursuant to 52 U.S.C. § 10101(a)(2), “[n]o person acting under color of law shall . . . deny the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is **qualified under State law to vote** in such election.” (Emphasis added.)

Also known as the “Materiality Provision” of the Voting Rights Act (“VRA”), this “provision was intended to address the practice of requiring unnecessary information for **voter registration** with the intent that such requirements would increase the number of errors or omissions on the application forms, thus providing an excuse to disqualify potential voters.” *Schwier v. Cox*, 340 F.3d 1284, 1294 (11th Cir. 2003) (emphasis added). “This [provision] was necessary to sweep away such tactics as disqualifying an applicant who failed to list the exact number of months and days in his age.” *Condon v. Reno*, 913 F.

Supp. 946, 950 (D.S.C. 1995). It is “an anti-discrimination statute, designed to eliminate discriminatory practices of registrars through arbitrary enforcement of **registration** requirements . . .” *McKay v. Altobello*, CIVIL ACTION NO. 96-3458 SECTION: E/4, 1996 U.S. Dist. LEXIS 16651, at *1 (E.D. La. Oct. 31, 1996) (emphasis added).

“There are two types of non-material omissions possible under the VRA: 1) failure to provide information, such as race or social security number, that is not directly relevant to the question of eligibility; and 2) failure to follow needlessly technical instructions, such as the color of ink to use in filling out the form.” *Diaz v. Cobb*, 435 F. Supp. 2d 1206, 1213 (S.D. Fla. 2006).

Said statutory “section . . . provides specifically for protections against denials based on errors or omissions on ‘records or papers’ that are immaterial to the determination of an individual’s qualification to vote.” *Friedman v. Snipes*, 345 F. Supp. 2d 1356, 1372 (S.D. Fla. 2004). Such “error and omission” . . . [must] pertain to determining eligibility to vote.” *Id.*

Accordingly, the challenged statutory language in this case is far afield from the types of provisions that have been held to be violative of the Materiality Provision, as the date-and-sign statute has a clear administrative purpose, only constitutes a limited burden to all absentee and mail-in voters, and has no application to voter registration. *Compare Diaz*, 435 F.Supp. 2d at 1213; *see also Schwier v. Cox*, 439 F.3d 1285 (11th Cir. 2006) (affirming immateriality of statutory provision that required disclosure of social

security numbers for purposes of the VRA when required disclosure of such information is otherwise prohibited by federal law).

Indeed, state courts in Pennsylvania dismissed this same challenge in January when it correctly concluded “that section 10101(a)(2)(B) is inapplicable because section 1306-D(a) of the Election Code dictates the validity of a mail-in vote that has been cast by an elector who is otherwise qualified to vote, and does not, in any way, relate to the whether that elector has met the qualifications necessary to vote in the first place.” *Ritter v. Lehigh Cty. Bd. Of Elections*, No. 1322 C.D. 2021, 2022 Pa. Commw. Unpub. LEXIS 1, at *26 (Pa. Commw. Ct. Jan. 3, 2022) (citing *Friedman v. Snipes*, 345 F.Supp.2d 1356, 1371 (S.D. Fla. 2004)).

The Materiality Provision is completely inapplicable to the present circumstances.

II. The Decision of the Court Below Improperly Truncated the Power of the General Assembly to Legislate for Pennsylvania’s Elections

In contrast to the decisions of the Commonwealth Court, the Supreme Court of Pennsylvania, and the District Court, the Third Circuit found that the appellant-voters possessed both a private right of action to enforce the Materiality Provision, and that “the dating provisions contained in 25 Pa. Cons. Stat. §§ 3146.6(a) and 3150.16 are immaterial to a voter’s qualifications and eligibility under § 10101(a)(2)(B).” *Migliori v. Cohen*, 36 F. 4th 153 (3d Cir. 2022).

In a decision that Justice Alito deemed “very likely wrong”, “[t]he Third Circuit’s interpretation broke new ground” and allowed election administration provisions in only very narrow circumstances. *Ritter v. Migliori*, 142 S. Ct. 1824, 1824 (2022) (Alito, J. dissenting). Reflecting the attenuated link between the requirement to “date and sign” absentee and mail-in ballots and an elector’s “eligibility to vote”,³ rather than examining *whether the statute in question fell within the true bounds of the Materiality Provision*, the court below instead flipped that inquiry and based its decision on whether the date and sign “requirement is material in determining whether such individual is qualified to vote under Pennsylvania law.” *Migliori*, 36 F.4th at 153. According to this opinion, the only way a Pennsylvania election administration statutory “requirement is material [is] if it goes to determining age, citizenship, residency, or current imprisonment for a felony.” *Id.* (citing 25 Pa. Cons. Stat. §§ 1301(a), 2811).

And indeed, the Third Circuit was ultimately correct that the “date and sign” statutes had no applicability “in determining whether [an] individual is qualified to vote under Pennsylvania law.” *Id.* Rather than rendering the statutes in question violative of the Materiality Provision, however, that determination instead reflects the threshold problems with the court’s lens of analysis.

The qualification of electors is but one of many parts of administering a free and equal election. Ballots

³ *Friedman v. Snipes*, 345 F. Supp. 2d 1356, 1372 (S.D. Fla. 2004).

must be cast through specifically prescribed methods,⁴ and they must be cast on time,⁵ and in the proper locations.⁶ The alternative of this is an anarchistic system where any registered elector could cast a vote whenever, wherever, and in whatever form the elector so chose.

But our constitutional system does contain election administration rules. “Even the most permissive voting rules must contain some requirements, and the failure to follow those rules constitutes the forfeiture of the right to vote, not the denial of that right.” *Ritter v. Migliori*, 142 S. Ct. 1824, 1825 (2022) (Alito, J. dissenting).

The Third Circuit’s analysis, however, ignores the obvious necessity of “rules setting the date of an election, the location of the voter’s assigned polling place, the address to which a mail-in ballot must be sent.” *Id.* While none of these rules “ha[ve] anything to do with the requirements that must be met in order to establish eligibility to vote . . . it would be absurd to judge the validity of voting rules based on whether they are material to eligibility.” *Id.*

⁴ See *Brnovich v. Democratic National Committee*, 141 S. Ct. 2321 (2021) (“Casting a vote, whether by following the directions for using a voting machine or completing a paper ballot, requires compliance with certain rules.”)

⁵ Indeed, the Third Circuit’s *Migliori* decision notes this fact, observing that ballot “[d]elivery is timely if received by the board of elections by 8:00 p.m. on Election Day.” *Migliori*, 36 F.4th at 153 (citing 25 Pa. Stat. §§ 3146.6(a), 3150.16(a)).

⁶ See, e.g., Pa. Const. Art. VII, § 1.

Yet, rather than acknowledging this threshold problem with its analysis, the court below pigeonholed the administrative “date and sign” requirement into a framework judging whether someone is qualified to vote. It simply does not fit.

As such, if this Court were to grant *certiorari* and hear this case on its merits, reversal would be appropriate.

III. Should the Third Circuit’s Decision be Left in Place it Would be Unworkable

A. The Third Circuit’s Decision is Unworkable and Will Lead to a Torrent of Additional Litigation

As Justice Alito correctly observed, if the decision of the court below is “left undisturbed, it could well affect the outcome of the fall elections.” *Ritter v. Migliori*, 142 S. Ct. 1824, 1824 (2022) (Alito, J. dissenting).

As discussed above, under the framework put in place pursuant to the *Migliori* decision, it is unclear what, if any, election administration rules may ultimately be left in place on the basis of “materiality.”

Unfortunately, this is not a hyperbolic concern in Pennsylvania, given recent decisions whereby Pennsylvania courts have set aside numerous democratically enacted sections of the Election Code, including altering the received-by deadline for mail-in

ballots,⁷ invalidating the state's congressional map,⁸ and invalidating democratically enacted voter identification laws.⁹

Indeed, shortly after the decision of the court below in this case, a group of voters sought to invalidate the deadline for receipt of mail-in ballots and the requirement that mail-in ballots be cast in secret on the basis that those provisions are “immaterial”, citing heavily to precedent created in this case. *See Dondiego v. Lehigh Cty. Bd. of Elections*, No. 5:22-cv-2111-JLS (E.D. Pa.). And while that matter was dismissed with prejudice due to the consent of the parties, that case is only a taste of what is to come in the leadup to the 2022 General Election.

Most recently, Acting Secretary of the Commonwealth Leigh Chapman has filed suit in Pennsylvania Commonwealth Court seeking relief against three counties that did not count undated mail-in ballots in the 2022 Primary Election. *Chapman v. Berks Cty. Bd. of Elections*, No. 355 MD 2022 (Pa. Commw. Ct.). The principal authority cited to by Acting Secretary Chapman was the Third Circuit's decision in *Migliori*.

⁷ *Pa. Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020), cert. denied, *Republican Party of Pa. v. Degraffenreid*, 141 S. Ct. 732 (2021).

⁸ *League of Women Voters v. Commonwealth*, 178 A.3d 737 (Pa. 2018), cert. denied, *Turzai v. Brandt*, 139 S. Ct. 445 (2018).

⁹ *Applewhite v. Commonwealth*, 54 A.3d 1 (Pa. 2012).

Therefore, this usage of the decision of the court below as precedential authority in critically important election cases weighs in favor of the *Munsingwear* vacatur requested by Petitioner.

B. *The Third Circuit’s Decision Voids Act 77 And the Very Institution of No-Excuse Mail-In Voting*

Should the Third Circuit’s decision be left in place, it would also trigger the non-severability clause of the legislation that, *inter alia*, authorized no-excuse mail-in voting in Pennsylvania.

As Justice Brobson of the Supreme Court of Pennsylvania recently noted, Pennsylvania courts and parties have “warned that “if the no-excuse mail-in provisions of Act 77 are found to be unconstitutional, all of Act 77’s provisions are void.” *McLinko v. Commonwealth*, No. 14 MAP 2022, slip op. at 5 (Pa. Aug. 2, 2022) (Brobson, J., dissenting) (*quoting* *McLinko v. Commonwealth*, 270 A.3d 1243, 1277-78 (Pa. Commw. Ct. 2022) (Wojcik, J., concurring and dissenting)).¹⁰ The non-severability clause would be

¹⁰ Justice Brobson also quotes the argument of the Democratic National Committee (“DNC”) and Pennsylvania Democratic Party in *McLinko* that “Act 77’s non-severability provision . . . requires that nearly the entire Act—which includes a multitude of changes to the Pennsylvania election code—fall if universal mail voting is deemed unconstitutional.” *McLinko v. Commonwealth*, No. 14 MAP 2022, slip op. at 5-6 (Pa. Aug. 2, 2022) (Brobson, J., dissenting) (*quoting* DNC Br. At 45). *See also* *Pa. Democratic Party v. Boockvar*, 238 A.3d 345, 367 (Pa. 2020) (discussing parties’ arguments that “the trigger [of] the nonseverability provision of Act 77 . . . would invalidate the entirety of the Act, including all

triggered if a court would determine that any specifically enumerated Act 77 “provisions are invalid.” *McLinko v. Commonwealth*, 270 A.3d 1243, 1277-78 (Pa. Commw. Ct. 2022) (Wojcik, J., concurring and dissenting).

Section 11 of Act 77 provides that “Sections 1, 2, 3, 3.2, 4, 5, 5.1, 6, 7, 8, 9 and 12 of this act are nonseverable. **If any provision of this act or its application to any person or circumstances is held invalid, the remaining provisions or applications of this act are void.**” 2019 Pa. Legis. Serv. Act 2019-77 (S.B. 421) (West) (emphasis added). Sections 6 and 8 of Act 77 contain the dating requirement that was deemed immaterial by the Court below. *Id.*; *Migliori*, 36 F.4th at 153.¹¹

Since the Third Circuit’s decision invalidating the “date and sign” requirement results in “[a] provision of this act or its application to any person or circumstance held invalid,” the Third Circuit’s decision necessarily would invalidate the remaining Sections of Act 77, listed in Section 11. 2019 Pa. Legis. Serv. Act 2019-77 (S.B. 421) (West).

“As a general matter, nonseverability provisions are constitutionally proper” under Pennsylvania law. *Stilp*

provisions creating universal mail-in voting.”). No Pennsylvania court has directly ruled on the non-severability provision of Act 77.

¹¹ Importantly, the non-severability clause is triggered if any of the enumerated sections are “held invalid” as here, rather than needing to be declared unconstitutional. 2019 Pa. Legis. Serv. Act 2019-77 (S.B. 421) (West).

v. Commonwealth, 905 A.2d 918, 978 (Pa. 2006). “There may be reasons why the provisions of a particular statute essentially inter-relate In such an instance, the General Assembly may determine that it is necessary to make clear that a taint in any part of the statute ruins the whole.” *Id.* “Or, there may be purely political reasons for such an interpretive directive, arising from the concerns and compromises which animate the legislative process.” *Id.*

“[I]nseverability clauses serve a key function of preserving legislative compromise;’ they ‘bind[] the benefits and concessions that constitute the deal into an interdependent whole.’ In an instance involving such compromise, the General Assembly may determine . . . [that] a nonseverability provision, in such an instance, may be essential to securing the support necessary to enact the legislation in the first place.” *Id.* (citations omitted).

This Court has similarly deferred to the legislative prerogative to construct legislation that contains either severability or non-severability provisions, noting that when the legislature has

“include[d] an express severability or nonseverability clause in the relevant statute, the judicial inquiry is straightforward. At least absent extraordinary circumstances, the Court should adhere to the text of the severability or nonseverability clause. That is because a severability or nonseverability clause leaves no doubt about what the enacting [legislature] wanted if one provision of the law were later declared unconstitutional. A severability clause

indicates that [the legislature] did not intend the validity of the statute in question to depend on the validity of the constitutionally offensive provision. And a nonseverability clause does the opposite.”

Barr v. Am. Ass’n of Political Consultants, 140 S. Ct. 2335, 2349 (2020) (internal citations omitted).

Here, the underlying legislation has a clear “nonseverability clause [which] leaves no doubt what the [Pennsylvania General Assembly] wanted” should a portion of Act 77 be invalidated. *Id.* The instant nonseverability clause “serve[d] a key function of preserving legislative compromise” and “bind[ed] the benefits and concessions that constitute the deal into an interdependent whole.” *Stilp*, 905 A.2d at 978.

That is exactly the situation that led to the passage of Act 77, a piece of bipartisan legislation that accomplished a wide variety of policy objectives – the combination, of which, made the compromise tenable to all. Removing core provisions of Act 77 – those listed in Sections 6 and 8 – would have led to the disintegration of that bipartisan compromise. As such, the non-severability provision in Act 77 was “essential to securing the support necessary to enact the legislation.” *Stilp*, 905 A.2d at 978.

While the issue of the application of Act 77’s non-severability clause is not before the Court in this case, the provision’s existence weighs in favor of the Petitioner’s requested relief. Given that the Third Circuit’s decision became “moot on its way here” to this Court, it would be improper to leave such a decision in

place given the lack of complete advocacy on the underlying issues and the possible significant effect of the underlying decision on the administration of Pennsylvania elections.

CONCLUSION

For the foregoing reasons, *Amici* respectfully urge this Court to grant Petitioner's requested relief and vacate the Third Circuit's decision under *United States v. Munsingwear, Inc.* 340 U.S. 36 (1950).

Respectfully submitted,

CHALMERS & ADAMS LLC

ZACHARY M. WALLEN

Counsel of Record

301 South Hills Village Drive

Suite LL200-420

Pittsburgh, Pennsylvania 15241

Phone: 412-200-0842

Email: zwallen@chalmersadams.com

Counsel for Amici Curiae Speaker of the Pennsylvania House of Representatives, Bryan Cutler, Majority Leader of the Pennsylvania House of Representatives, Kerry Benninghoff, President Pro Tempore of the Pennsylvania Senate, Jake Corman, and Majority Leader of the Pennsylvania Senate, Kim Ward